

Honorable Thomas S. Zilly

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

AT&T MOBILITY LLC, a Delaware limited
liability corporation,

Plaintiff,

v.

HOLADAY-PARKS FABRICATORS, INC.,
a Washington Corporation,

Defendant,

v.

EVERGREEN POWER SYSTEMS, INC., a
Washington Corporation; SOURCE NORTH
AMERICA CORPORATION, an Illinois
corporation d/b/a Ace Tank & Fueling
Equipment, a Division of Source North
America Corporation; and PHILILPS PUMP
LLC, a Connecticut domestic limited liability
company,

Third-Party Defendants

No. 2:10-cv-00468 TSZ

**SOURCE NORTH AMERICA
PROPOSED JURY INSTRUCTIONS**

Third Party Defendant Source North America, Inc., ("Ace Tank" or "SNA") hereby

submits its proposed jury instructions.

**SOURCE NORTH AMERICA
PROPOSED JURY INSTRUCTIONS
REGARDING BREACH OF
EXPRESS WARRANTY - 1
[CASE NO. 2:10-CV-00468 TSZ]**

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PROPOSED INSTRUCTION NO. B- 1

DESCRIPTION OF HOLADAY PARKS' WARRANTY CLAIM

Holaday-Parks is asserting the following claims against Ace Tanks:

i) HP contends that Ace Tanks entered into a contract to provide certain goods and services relating to the Phase 6 fuel system.

ii) HP contends that under the contract, Ace Tanks warranted that the goods and services it provided in connection with Phase 6 would be of a workmanlike quality and free from defects.

iii) HP contends that to the extent the goods and services provided by Ace Tanks on the Phase 6 project breach one or more of these warranties, HP is entitled to certain damages, which will be further explained as I read through these instructions.

Ace Tank has raised the following defenses:

1. It did not give an express warranty of its own. It merely passed through the warranty of the product manufacturer, Phillips Pump;

2. If you find that Source expressly warranted the product, and you also find a breach of that warranties, then Holaday Parks will be entitled to damages, as will be further explained as I read these instructions to you.

I will now instruct you on the law of warranties as it relates to Holaday Parks' warranty claim against Source North America.

SOURCE NORTH AMERICA
PROPOSED JURY INSTRUCTIONS
REGARDING BREACH OF
EXPRESS WARRANTY - 2
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PROPOSED INSTRUCTION NO. B- 2

EXPRESS WARRANTY DEFINED

A seller creates an express warranty by any of the following means:

1. By making any statement of fact or promise to the buyer that the goods delivered will conform to the statement of fact or promise about the quality of the product.
2. By describing the goods that the products sold will conform to the description in a way that the description becomes a part of the basis for the bargain.
3. By providing a sample or model and promising that the products delivered will conform to the sample or model

The seller does not have to use formal words such as “warrant” or “guarantee” or that it have a specific intention to make a warranty.

RCW 62A.2-313

SOURCE NORTH AMERICA
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PROPOSED INSTRUCTION NO. B-3

CREATION OF EXPRESS WARRANTY

Before you can conclude that Source gave any express warranty, you must first find that Source, and not the fuel system manufacturer, made a representation or affirmation of fact about the fuel control system and that Holaday-Parks relied on Source's representation or affirmation of fact about the fuel control system.

Casper v. E.I. DuPont De Nemours and Co., 806 F. Supp. 903 at 909
(E.D. Wash. 1992)

SOURCE NORTH AMERICA
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REGARDING BREACH OF
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PROPOSED INSTRUCTION NO. B-4

BREACH OF WARRANTY-BASIC MEASURE OF DAMAGES

If you find that Source gave an express warranty for the fuel control system, and if you also find that it breached that warranty for the fuel control system, then Holaday Parks is entitled to be compensated for that breach.

I will now instruct you on the way you are to calculate damages if you find that Source breached any warranty it gave to Holaday Parks:

The measure of damages for breach of warranty is the difference between the value of the fuel control system that was delivered to the AT&T job site and the value it would have had if it had been delivered as warranted, unless special circumstances show proximate damages of a different amount.

R.C.W. § 62A.2-714 and

Lidstrand v. Silvercrest Industries 28 Wash.App. 359 (1981)

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PROPOSED INSTRUCTION NO. B-5

BREACH OF WARRANTIES – CONSEQUENTIAL DAMAGES

If you find that Source warranted the fuel control system, and if you further find that it breached that warranty, then, in addition to awarding any damages for the difference in value of the system as warranted and as delivered, if you find that fuel spill damages were reasonably foreseeable to Source at the time of contract, you can award consequential damages unless you also find that Holaday-Parks knew about the fuel control system malfunction before the spill.

Consequential damages are those damages that naturally flow from the breach of warranty without any intervening cause.

If you find that Holaday Parks knew of the malfunction before the spill, then you must also find that any damage caused by the spill was not proximately caused by the breach of warranty. In such event, you shall award no consequential damages to Holaday Parks.

Lidstrand v. Silvercrest Industries 28 Wash.App. 359, 365-366, 623 P.2d 710 (1981)

R.C.W. § 62A.2-715(2)(b) and Official Comment 5 to RCW 62A.2-715(2)(b);

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PROPOSED INSTRUCTION NO. B-6

CONSEQUENTIAL DAMAGES – DUTY OF PARTY INJURED TO

AVOID KNOWN RISKS

In fixing the amount of money which will reasonable and fairly compensate Holaday Parks, you are to consider that a person whose property or business is damaged must exercise ordinary care to minimize existing damages and to prevent further damage. If any loss is proximately caused by a failure to exercise such care, damages cannot be recovered for such loss.

If you find that Holaday Parks knew the fuel control system was malfunctioning before the spill and if you further find that it did not take reasonable steps to mitigate harm by taking steps to prevent the system malfunction from causing damage to property or injury to persons, you shall not award any consequential damages to Holaday Parks.

RCW 62A.2-715, Official Comment 5 and *Hinderer v. Ryan*, 7 Wn. App. 434 (1972)

Dated this 9th day of April 2011

SIMBURG, KETTER, SHEPPARD & PURDY, LLP

By: /s/ Andrew D. Shafer
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SOURCE NORTH AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that on the date below I electronically filed the foregoing PROPOSED JURY INSTRUCTIONS with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

Seann C. Colgan, scolgan@corrchronin.com
William F. Cronin, wcronin@corrchronin.com
Jeffrey D. Laveson, laveson@carneylaw.com
Shilpa Bhatia, Bhatia@wscd.com

And I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants.

None.

Dated this 9th day of April, 2010.

/s/ Brian D. Carpenter
Brian D. Carpenter,
Legal Assistant to Andrew D. Shafer

SOURCE NORTH AMERICA
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